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Supreme Court, U.S.
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No. 04-444

IN THE

Supreme Court of the United States

MELITA PICCIOTTO AND ATHENA PICCIOTTO
Petitioners,

v.

MICHAEL C. GILLERAN AND OTHERS,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Judicial Court For
The Commonwealth Of Massachusetts

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERIORARI

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III. The State Courts Retained the Petitioners' Property at the Request of the Attorney Lienholders, and Further Deprived the Petitioners Recourse to Recover Their Property by Summarily Dismissing the

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INTRODUCTION

The Respondents urge this Court not to grant writ based on the following arguments:

1. There is no federal question;
2. There is no final judgment; and
3. The Petitioners have failed to demonstrate that they have been denied a property interest.

The facts of this case do not support the Respondents' arguments. The State has violated the Petitioners' guarantees of the Fourteenth Amendment of the Constitution of the United States by:

1. Depriving the Petitioners of their property, preventing the Petitioners from tendering payment, and continuing to shift the Petitioners' property to the Respondents through a 12% Post Judgment Interest.
2. There is a final judgment, and the amounts owed by the Petitioners became fixed and liquidated in October of 2002; and
3. The Petitioners have demonstrated that they have been denied substantial property interest by the State by:

    a. Refusing, after the trial court entered final judgment, to release the portion of their property that was not needed to secure any attorneys' liens; and

    b. Summarily dismissing their lawsuit to recover their property.

REASONS FOR GRANTING THE WRIT

I. This Court Has Never Ruled on What Constitutes a Final Judgment, i.e., When a Final Judgment Occurs. The States Are Split.

II. It Would be of Public Interest to Establish if the Continued Retention by the Trial Court of the Petitioners' Property (Settlement Funds) After Final Judgment Has Been Entered by the Trial Court, and the Court's Refusal to Allow the Petitioners to Pay Their Judgments While It Imposes Post Judgment Interest (and Thus, Transfers the Property of The Petitioners to the Attorney Lienholders), Violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

II. The State Courts Retained the Petitioners' Property at the Request of the Attorney Lienholders, and Further Deprived the Petitioners Recourse to Recover Their Property by Summarily Dismissing the Petitioners' Lawsuit Against the Respondents.[1] That Constitutes a

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[1] The reason that lawsuit was filed by the Petitioners was to recover their property, after the attorney lienholders' wrongfully interfered with the Petitioner receiving their property by demanding the entire settlement. Prior to filing that lawsuit, the Petitioners sought leave of court to amend the pleadings to bring forth those claims. Even though leave shall be freely given when justice so requires; *Forman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962), the trial court denied the request.

Deprivation of Property Rights Without Due Process of Law or Equal Protection of the Laws.

FACTUAL BACKGROUND

March 22, 2003, the judgment in the interpleader action became final (A. a), yet, the trial court continued to retain the Petitioner's property for the benefit of private parties, and enhanced the attorney lienholders' jury verdicts through the application of 12% "punishment"[2] post judgment interest.[3] Under

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[2] The Respondents are being disingenuous with this Court to suggest that the 12% interest was not to, as the court itself stated, "punish" the clients for taking the attorneys' fee claims to trial, and that interest is automatically imposed. The truth is that Massachusetts law holds that depositing funds into a court-held escrow account "stops the interest from running, - other than what is generated by the actual fund itself."; *The Suffolk Bank v. The Worcester Bank,* 22 Mass. (5 Pick.) 106 (1827); *Underwood v. Coolidge Ice Co.*, 232 Mass. 124, 122 N.E. 270 (1919); see also *Smith and Zobel's Mass Practice* explaining Rule 67. The higher courts refused to address this when asked to consider the lack of constitutionality in continuing to refuse to pay the Respondents, while also retaining the Petitioners' property in order to transfer the Petitioners' property to the Respondents to enhance attorney lienholders fees.

[3] As explained on page seven of the Petitioners' writ, in November of 2002, the Petitioners moved the trial court to release the money owed to the attorney lienholders according to the jury verdict (including the accrued interest), and release the rest of the property that belonged to the Petitioners, but was still being held by the trial court. The trial court refused to do that, without providing any reason. However, its 12% "punishment" interest in favor of attorney lienholders makes the reason easy to divine.

Massachusetts law, contrary to some other jurisdictions, when a trial court enters judgment, the judgment is final, even though the case may still be pending on appeal; *O'Brien v. Hanover Insurance Company*, 427 Mass. 194, 201, 692 N.E.2d 39, 44, (1998).

- April 5, 2002, the same trial judge who had imposed himself *de facto* without following the requisite procedure for a special assignment[4] to preside over the interpleader action, and had denied the Petitioners' request to amend the pleadings, took another *de facto* seizure of the Petitioners' lawsuit,[5] and summarily dismissed the Petitioner's rights to that lawsuit. May 10, 2004, the appeals court affirmed the Order of Dismissal. June 30, 2004, the Massachusetts Supreme Judicial Court affirmed that

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[4] In Massachusetts, judges are rotated on a pre-established schedule. A judge may never impose himself into a case without special assignment by the chief justice the Superior Court, pursuant to Standing Order No. 9-80, and only after notice and an opportunity to be heard is provided to all parties. That did not happen in this case.

[5] The Respondents assert that discovery was "complete" in the interpleader action on May 2001 (at page 4). That is demonstrably false. The underlying record proves that August 21, 2001, in the interpleader action, the Respondents conducted a lengthily deposition of Petitioner Melita Picciotto as part of the ongoing discovery. The Petitioners had been forced to file their lawsuit against the Respondents on May 21, 2001, because the trial judge had already refused to allow an amendment to their pleadings (see footnote 1 above).

order by *refusing to grant any further appellate review in the dismissed cases.*

- July 16, 2004, the state court distributed to Respondent Attorney Gilleran and his law firms, the sum of $1,782,731.65 (A. b) and another $69,505,22 on July 22, 2004 (A. d).

- The state court's distribution July 22, 2004, to pay Attorney Gilleran the judgment of $15,747.30, that Attorney Gilleran held against the Petitioners has been more than fully satisfied. However, the trial court continues to withhold the Petitioners property.

- The Respondents admit that the Petitioners settled their claims[6] against the Travelers January 6, 1999 (see page 2 of Respondents' Brief in Opposition).

- Through footnote 2 of page 5, the Respondents also confirm that the Petitioners only received $200,000 of their 2 million-dollar settlement to pay a law firm that represented the Petitioner's interests.

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[6] A court, in reviewing a settlement [agreement] need not engage in a trial of the merits, "for the purpose of settlement is precisely to avoid such trial."; Greenspan *v. Bogan*, 492, F.2d 375, 381 (1st Cir. 1974); see also *United Founders Life Ins. Co. v. Consumer's National Life Ins. Co.*, 447 F.2d 647 (7th Cir. 1960) and *Florida Trailer & Equipment Co. V. Deal*, 284 F.2d 567, 571 (5th Cir. 1960). The assertions of the Respondents before this Court that the Petitioners did not want to pay any attorney fees is readily proven false through the documents in the underlying record. The Respondents are obviously trying to create a controversy as a means to avoid this Court's scrutiny.

- The Respondents attempt to create a controversy by stating that in January 2004, Juan Nunez, one of the settling claimants, filed suit in Suffolk Superior Court against the other claimants, including Melita and Athena, seeking a declaratory judgment concerning a distribution of most of the settlement funds remaining after payment of his judgment in favor of the law firms. (Respondents' brief at page 12).

- In fact, Mr. Nunez entered into a secret settlement agreement with Respondent Gilleran, and filed a new lawsuit against the petitioners. The lawsuit is frivolous because Mr. Nunez filed an affidavit in the interpleader action, attesting as follows:

AFFIDAVT OF JUAN NUNEZ

Juan Nunez, being duly sworn, hereby deposes and states:

1. I make this affidavit based upon my own personal knowledge.

2. When we settled with Travelers in January, 1999, it was agreed among myself, Stefano, Judy, Melita, Athena, and Foreign Car Center, Inc., that 2 million dollars of the settlement funds was specifically for settlement of Athena and Melita's claims.

Signed under the pains and penalties of perjury this 18th day of February 2000.

_____

Juan Nunez

Thus, judicial estoppel prevents Mr. Nunez from now rewriting the agreed upon allotments, and prevents the court from redistributing the settlement funds of the Petitioners; *Paixao v. Paixao*, 429 Mass. 307, 309 – 311(1999); *East Cambridge Savings Bank v. Wheeler*, 422 Mass. 621, 623-624 (1966); *Chiao Yun Ku v. Town of Framingham,* 53 Mass. App. Ct. 727, 729 (2002) and *Correia v. De Simone*, 34 Mass. App. Ct. 601, 603-04 (1993).

- Furthermore, pursuant to the trial court's Order of October 9, 2001 (item 2 A at A. g), the Petitioners' settlement agreement with Mr. Nunez "binds" Mr. Nunez[7] and he cannot change his mind years later.

- Moreover, all settling parties, including the attorney who represented Mr. Nunez at the settlement, have

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[7] The trial judge order asserted that the Petitioners' property rights remained intact, and, thus, formed the foundation for the trial judge preventing the Petitioners from obtaining any adjudication from the jury. The ruling of the trial judge, which was memorialized in the transcript, is as follows: "And if the attorneys' recovery, if any, falls short of exhausting the entire fund, [the Petitioners'] claims are still intact." Despite that ruling, after the jury verdict, the trial judge still retained the Petitioners' property. The reason is explained in the pre-trial affidavits supporting the pre-trial motion to recuse (which included an affidavit of good faith from Mr. Nunez's attorney), which attested to the manifest bias and prejudice of the trial judge against the Petitioners in the interpleader action. The Petitioners have successfully documented and exposed the *ex parte* meeting between the judge and one of the parties to the litigation during the proceedings (even though, as the underlying record proves, the trial judge, until confronted with the irrefutable proof to the contrary, had firmly denied from the bench, in open court, that the *ex parte* meeting had ever occurred).

signed affidavits and/or testified under the pains and penalties perjury attesting that all of the settling parties agreed to the Petitioners' allotments, which at the time of the settlement, was 2 million dollars.

- Moreover, Mr. Nunez has also admitted under the pains and penalties of perjury that the Petitioners never had an agreement with him that they would pay his judgment in favor of the law firms. The Petitioners are only responsible for the payment of their own judgments, and not those of any other party.

- The Respondents correctly pointed out that:

    1. "Both the single justice and the appellate panel treated the Picciottos' petition as raising a question of discretionary relief;

    2. "Neither [courts] dealt with the constitutional issues that the Picciottos ask this Court to review.";

    3. "Noticeably absent form the trial court's ruling and from the brief memorandum opinion of the Appeals court is any discussion of the constitutional issues that the Petitioners seek to bring before this court."

The Respondents neglect to tell this Court, however, that the Petitioners had specifically pled in the petitions and in their appeals to the state courts that their

fundamental property rights and the guarantees provided to every American by Article XIV of the United States Constitution were being violated, but the state courts simply chose to ignore the constitutional arguments outlined in those pleadings, and declined to grant any relief. The Massachusetts courts turn their backs to the premise that a deprivation of property, even if temporary, is unconstitutional. That caused the Petitioners to petition the United States Supreme Court through the present writ.

None of the lower court's transgressions raised an eyebrow with the higher courts, thus it is no surprise that in Massachusetts, lower courts feel free to:

a) Allow jurors to come to court dressed in Halloween costumes;

b) Allow parties representing attorney lienholders to pass candies and memorabilia to the jury;

c) Remove the American flag when sworn testimony is to be provided to the jury;

d) Allow the circulation of a suggested cast list of who should play whom in the movie of the circus-like atmosphere.

Despite what the attorneys wanted in regard to the jurors, the Petitioners never authorized the conduct, and no defendant should be subjected to it. The Petitioners are of the opinion that such a trial constitutes an unfair tribunal, and the dismissal of their lawsuit by such an unfair tribunal (which occurred through the judge's second *de facto* seizure of the Petitioners' case absent the

required procedure), violated due process and the Fourteenth Amendment of the United States Constitution which guarantees every American citizen a fair trial before a fair tribunal; *In Re: Murchison*, 349 U.S. 133, 136 (1955). The Massachusetts higher courts, including Chief Justice Marshall, who assures the public that our state courts are vigilant in providing litigants with a tribunal that is as "fair as the lot of humanity will permit," refused to address the Petitioners' argument that the judge who dismissed their lawsuit obviously constituted an unfair tribunal

CONCLUSION

The Respondents try to convince this Court that the Petitioners have no right to be before this Court as the appeal of the interpleader action is still pending in the Massachusetts Courts, and the relief that the Appellants were seeking from the state courts is simply "discretionary." That is not so. The Appellants were seeking to either have their lawsuit reinstated or to have their property released to them. The Petitioners were requesting that the Massachusetts courts either release their property to them, or, at the very least, allow them to have their day in court. The Massachusetts courts refused to do either one. Therefore, this case falls within the provision of 28 U.S.C. 1257. The Petitioners pray that his Honorable Court will grant them their writ.

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SUPPLEMENTAL APPENDIX

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT DEPT.
C.A. 99-1594A

Albert P. Zabin, Esq., et als
Plaintiffs
v.
Stefano Picciotto,
Defendants

JUDGMENT OF DISMISSAL OF THE CLAIM OF ATTORNEY GEORGE E. RICHARDSON

JUDGMENT

1. In accordance with the Ruling of Dismissal of the Remaining Claim of Attorney George E. Richardson (dated May 28, 2002) and docketed on June 3, 2002, as Entry 542), Judgment of Dismissal hereby enters upon the remaining claim of the plaintiff George E. Richardson.

2. While the Ruling of Dismissal of Entry 542 had the intended character of an appealable final order within the meaning of Mass. R.A.P. 3 and 4, the present judgment shall become the operative final entry for purpose of appeal.

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Mitchell J. Sikora, Jr.
Justice of the Superior Court
DATED: March 20, 2003

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT DEPT.
C.A. 99-1594A

Albert P. Zabin, Esq., et als
Plaintiffs
v.
Stefano Picciotto,
Defendants

ORDER FOR THE DISTRIBUTION OF ESCROW FUNDS FOR PAYMENT OF THE JUDGMENTS OF THE GILLERAN PARTIES

ORDER

1. Pursuant to the Allowance of the Joint Motion of Juan Nunez and the Gilleran Parties for Disbursement of Escrow Funds to Pay Judgments of the Gilleran Parties (Docketed Paper 705 dated June 14, 2004;notice sent June 15, 2004) in the absence of any intervening appellate action and direction; the court hereby authorizes and directs the Clerk Magistrate of the Suffolk Superior Court to release from the escrow fund the following amount to the specified parties:

The sum of One million Seven Hundred Eighty-Two Thousand Seven Hundred Thirty-One Dollars and Sixty-Five Cents ($1,782,731.65) as the entitlement of the Gilleran Parties inclusive of compensatory damages, prejudgment interest, post judgment interest, and costs, through July 15, 2004.

2. The Clerk Magistrate shall make the check in that amount payable to "Pepe & Hazard, LLP." That firm shall receive the payment in its capacity as counsel and agent for the Gilleran Parties.

3. Attorney Edward S. Cheng shall receive delivery of the check and shall furnish the Clerk Magistrate a receipt for the payment.

Mitchell J. Sikora, Jr.
Justice of the Superior Court

Dated: July 16, 2004

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT DEPT.
C.A. 99-1594A

Albert P. Zabin, Esq., et als
Plaintiffs
v.
Stefano Picciotto,
Defendants

SUPPLEMENTAL ORDER FOR THE DISTRIBUTION OF ESCROW FUNDS FOR PAYMENT OF THE JUDGMENTS OF THE GILLERAN PARTIES

ORDER

1. Pursuant to the Allowance of the Joint Motion of Juan Nunez and the Gilleran Parties for Disbursement of Escrow Funds to Pay Judgments of The Gilleran Parities (Docket Paper 705 dated June 14, 2004; notice sent on June 15, 2004); in the absence of any opposition to the motion and the Allowance; and in the absence of any intervening appellate action and direction; the court hereby authorizes and directs the Clerk Magistrate of the Suffolk Superior Court to release from the escrow fund the following amount to the specific parties:

The sum of Sixty-Nine Thousand Five Hundred Dollars and Twenty-Two Cents ($69,505.22) as a supplemental entitlement of the Gilleran parties inclusive of compensatory damages from Melita Picciotto and Athena Picciotto, related prejudgment and post judgment

interest, and apportioned joint costs through July 15, 2004.

2. The Clerk Magistrate shall make a supplemental check in that amount payable to "Pepe & Hazard, LLP," That firm shall receive the payment in its capacity as counsel and agent for the Gilleran parties.

3. Attorney Edward S. Cheng shall receive delivery of the check and shall furnish the Clerk Magistrate a receipt for the payment.

_____

Mitchell J. Sikora, Jr.
Justice of the Superior Court

Dated: July 16, 2004

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT DEPT.
C.A. 99-1594A

Albert P. Zabin, Esq., et als
Plaintiffs
v.
Stefano Picciotto,
Defendants

RULING UPON THE MOTION IN BEHALF OF ATHENA PICCIOTTO FOR RLEASE OF FUNDS

RULING

Upon consideration of all motion and opposition materials and of oral argument, the court denies the present motion (Docket entry 383) for the release of $446,050.67 from escrow and specifically to Athena Picciotto.

REASONING

1. The present motion rests upon the argument that Athena Picciotto has a specific distinguishable interest in the court-managed escrow fund. The Picciotto parties reason that they have formed an internal agreement for the allocation of the Travelers settlement amount; and that Athena's share under that intramural arrangement now comes to $445, 050.87 (after some adjustments to their original allocation of $500,000).

2. The internal agreement among the entire Picciotto parties (comprised of Stefano Judith, Athena Melita, Foreign Car Center, Inc., and Juan Nunez) binds them, but not any non-parties to their agreement, and not the court. If the Picciotto parties were to request an undifferentiated distribution form the escrow fund, the court would entertain it.

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Mitchell J. Sikora, Jr.
Justice of the Superior Court

Dated: 10/9/2001